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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DIANE STEELE, Respondent, v. SCOTT PALMER HOLCOMB, Appellant.	G057931 (Super. Ct. No. 30-2018-01011205) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Michael McCartin, Judge. Affirmed.

Veterans Legal Institute, and Ian C. Deady for Appellant.

Fiore Racobs & Powers, and Andrew D. Scoble for Respondent.

* * *

Defendant Scott Palmer Holcomb appeals the trial court's denial of his request for attorney fees based on plaintiff Diane Steele's voluntary dismissal of her petition for a civil harassment restraining order. Holcomb contends the court's statements made at a hearing on Holcomb's motion for reconsideration demonstrate it abused its discretion by relying on improper criteria and incorrect legal assumptions. We disagree and affirm.

I

FACTS AND PROCEDURAL HISTORY

In August 2018, Holcomb lived in a residential community where Steele served on the board of directors for the community's homeowners association. Steele filed a petition for a civil harassment restraining order against Holcomb (Code Civ. Proc., § 527.6),[1] alleging Holcomb engaged in "violent and harassing conduct" towards Steele, other board members, and property management employees about maintenance issues at his residence. At the trial court's initial hearing on the petition, Steele's counsel reported the parties would attempt to resolve the dispute through private mediation. The trial court granted Steele's request to continue the hearing over Holcomb's objection, who was defending himself in pro per. The court granted Steele another extension to May 2019.

Four days before the May hearing, Steele filed a request to dismiss her petition without prejudice. On the scheduled hearing date, Holcomb appeared in the trial court and orally requested an award of his costs, including attorney fees. The court dismissed Steele's petition and advised Holcomb he could file a motion asking for his attorney fees.

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[1] All further undesignated citations are to the Code of Civil Procedure unless otherwise specified.

Two days later, Holcomb filed two memoranda of costs on Judicial Council forms, requesting the trial court grant his request for $23,167 in attorney fees. Holcomb relied on section 685.040 of the Enforcement of Judgments Law and Civil Code section 1717, which allows the prevailing party to recover attorney fees on a contract containing an attorney fees provision. Holcomb also submitted a declaration showing he incurred $23,167 in legal fees when he hired counsel to advise him how to proceed in defending himself.

The trial court denied Holcomb's fee request the next day, without a hearing. Holcomb then filed an amended motion for reconsideration of the trial court's denial of his attorney fees request, arguing the "[c]ourt should reconsider its prior order due to the fact that [Holcomb] has made a sufficient showing of new or different facts, circumstances or law to include Code Civ. Proc., § 425.16, subd. (c); Code Civ. Proc., § 1717 and case law cited."

At the outset of the hearing on Holcomb's reconsideration motion, the trial court declared Holcomb failed to meet the statutory criteria for reconsideration. The court also disagreed with Holcomb's contention that Steele's dismissal of her petition resulted in Holcomb becoming the prevailing party: "That's discretionary with the court. I disagree when dismissed it [sic] and you're the prevailing party because of the totality of the case and the activity, sometimes there's other reasons for dismissing the case." The court noted that even if Holcomb was the prevailing party, he still would not award fees: "Assuming for argument purposes . . . you are the prevailing party . . . I would not order attorney's fees in this case, based upon the type of case it is and everything that's gone on."

At another point, the trial court elaborated further, explaining that even if it could reconsider its earlier ruling, "I'm still not inclined to grant attorney's fees or costs in this matter because technically, you might be the prevailing party because they dismissed the action, but the court doesn't award attorney's fees in these actions unless I

think there's bad faith and the matter is frivolous in the filings." The judge reasoned: "If I found you [i.e., Holcomb] were the prevailing party, it's still discretionary and I wouldn't in this case, just because of the fact that it was, you know, pretty much back and forth. But also, because you represent yourself." The judge also added: "[I]t probably wouldn't matter if you were represented with an attorney. Just in this proceeding. I don't think I would still order fees because I think there were – it was an acrimonious dispute."

The trial court denied Holcomb's "reconsideration request or the fee request at this time. That will be the order." Holcomb's notice of appeal stated he was appealing from the "Motion for Reconsideration re: Attorney's Fees is DENIED, CCP § 473."

II

DISCUSSION

As a threshold issue, the parties dispute whether we have appellate jurisdiction to entertain the merits of Holcomb's appeal because his notice of appeal failed to specify the trial court's denial of his attorney fee request. On the merits, Holcomb contends the court's denial was erroneous because it was "based on three erroneous beliefs." First, the court erred because it was required to find Holcomb the prevailing party as a matter of law, given Steele voluntarily dismissed her petition. Second, the court erred by requiring findings of bad faith and frivolousness to award fees. Finally, the court erred by denying Holcomb's fee request based on his pro per status.

Appealability

This court invited the parties to brief whether appellate jurisdiction was properly invoked. Steele correctly notes Holcomb appealed the trial court's order denying his motion for reconsideration, which is a nonappealable order (§ 1008, subd. (g); *Chango Coffee, Inc. v. Applied Underwriters, Inc.* (2017) 11 Cal.App.5th 1247,

1249), and not his actual request for attorney fees. Holcomb argues we should treat his appeal to be from the May 10, 2019 order denying his attorney fee request, which was the subject of his reconsideration motion.

The trial court's denial of Holcomb's attorney fee request was an appealable order (§ 904.1, subd. (a)(2)) and, as Holcomb correctly notes, "notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced." (*Luz v. Lopes* (1960) 55 Cal.2d 54, 59; Cal. Rules of Court, rule 8.100(a)(2).) Holcomb's notice of appeal identified the denial of attorney fees as the subject of Holcomb's appeal, and therefore demonstrates he intended to appeal the trial court's denial of his attorney fee request. Steele does not claim to have been misled or prejudiced by Holcomb's notice. Consequently, Holcomb's technically deficient notice of appeal sufficiently invoked appellate jurisdiction to review the merits of the trial court's decision to deny Holcomb's request for attorney fees.

Standard of Review

We review the trial court's denial of Holcomb's attorney fee request under two standards of review. We review specific questions of law de novo. (*Krug v. Maschmeier* (2009) 172 Cal.App.4th 796, 800 (*Krug*).) More broadly, we review the court's discretionary determination under section 527.6, subdivision (s), for abuse of discretion. (*Id.* at p. 798.)

"'All exercises of discretion must be guided by applicable legal principles . . . which are derived from the statute under which discretion is conferred. [Citations.] If the court's decision is influenced by an erroneous understanding of applicable law or reflects an unawareness of the full scope of its discretion, the court has not properly exercised its discretion under the law. [Citation.] Therefore, a discretionary order based on an application of improper criteria or incorrect legal assumption is not an exercise of

informed discretion and is subject to reversal.'" (*Cooper v. Bettinger* (2015) 242 Cal.App.4th 77, 90, quoting *Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 106.)

Under both standards, Holcomb as the appellant bears the burden to demonstrate error and resulting prejudice. (Cal. Const., art. VI, § 13; *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 293-294.) A reviewing court presumes a trial court's order to be correct (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 566) and that the record contains evidence to sustain the trial court's findings of fact. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

The Trial Court Did Not Err in Denying Holcomb's Request for Attorney Fees

Holcomb contends he was entitled to attorney fees as a matter of law. He relies on section 527.6, subdivision (s), which states, "[t]he prevailing party in an action brought pursuant to this section [civil harassment] may be awarded . . . attorney's fees." Because section 527.6 does not define "prevailing party," Holcomb argues the trial court was required to adopt the definition found in the general cost statue, which states a prevailing party includes "a defendant in whose favor a dismissal is entered. . . ." (§ 1032, subd. (a)(4).) Holcomb asserts the court erred in believing it had discretion to determine whether Holcomb qualified as a prevailing party, arguing "[t]his erroneous interpretation of the applicable law is directly counter to the plain text of section 1032, subdivision (a)(4)."

There are numerous problems with Holcomb's analysis, the most glaring being his failure to rely on section 527.6 in the trial court. Instead, Holcomb relied on inapplicable section 685.040 (*Lang v. Roché* (2011) 201 Cal.App.4th 254, 264 ["'judgment creditor'" means a "plaintiff who . . . won a judgment"] and section 1717, which concerns money judgments in foreign countries. Holcomb presumably meant to cite Civil Code section 1717, which allows a prevailing party to recover attorney fees on a contract containing an attorney fees provision. This section, of course, does not apply

in civil harassment cases and therefore the trial court did not err in rejecting Holcomb's attorney fee request. Holcomb also failed to cite section 527.6 in his reconsideration motion, relying instead on section 425.16, the anti-SLAPP statute. Holcomb simply cannot ask for fees under inapplicable code sections and then complain on appeal the court failed to apply a different code section it was never asked to apply. Holcomb therefore forfeited any claim the court erred in not applying section 527.6 by failing to raise the issue below.

Holcomb fares no better on the merits even if we assume the trial court should have applied section 527.6, which states that a prevailing party in a civil harassment proceeding "*may*" recover attorney fees. Because section 527.6 does not define the term "prevailing party," Holcomb contends courts *must* adopt the prevailing party definition in section 1032, which includes the entry of a dismissal in a defendant's favor. (§ 1032, subd. (a)(4).) Holcomb is simply wrong.

The premise for Holcomb's argument, "that a litigant who prevails under the cost statute is necessarily the prevailing party for purposes of attorney fees, has been uniformly rejected by the courts of this state." (*Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1572 (*Heather Farms*).) Indeed, the California Supreme Court recently declared that "the definition of a 'prevailing party' in section 1032 is particular to that statute and does not necessarily apply to attorney fee statues or other statutes that use the prevailing party concept." (*DeSaulles v. Community Hospital of Monterey Peninsula* (2016) 62 Cal.4th 1140, 1147.)

In *Heather Farms*, the appellate court rejected the argument that section 1032, subdivision (a)(4), required the trial court to adopt its definition of prevailing party in an action to enforce the governing documents of a homeowners association under former Civil Code section 1354. (See Stats. 2012, ch. 180 (Assem. Bill No. 805) § 1.) That section granted the prevailing party the right to recover attorney fees but did not define how the court should determine who qualified as a prevailing party. The court in

Heather Farms concluded section 1032 "only defines '"prevailing party"' as the term is used 'in that section.' It does not purport to define the term for purposes of other statutes." (*Ibid*.) The court instead followed previous cases that "declined to adopt a rigid interpretation of the term 'prevailing party' and, instead, analyzed which party had prevailed on a practical level." (*Id*. at p. 1574.) The court concluded a trial court making a practical determination on who is a prevailing party "should be affirmed on appeal absent an abuse of discretion." (*Ibid*.)

Holcomb's reliance on *Cano v. Glover* (2006) 143 Cal.App.4th 326 and *Adler v. Vaicius* (1993) 21 Cal.App.4th 1770 does not support his claim the trial court must adopt section 1032's definition of prevailing party. These cases merely hold the trial court could adopt section 1032's prevailing party definition in exercising its discretion, but was not compelled to do so as a matter of law. Here, the trial court could have determined Holcomb was the prevailing party, but in properly exercising its discretion the court was not required to reach this conclusion as a matter of law.

We next consider whether the trial court did, in fact, exercise its discretion properly. Holcomb contends the court abused its discretion because it incorrectly concluded it could not award attorney fees to a pro per litigant and improperly required Holcomb to show Steele acted in bad faith before it could grant Holcomb's fee request. The record does not support Holcomb's argument.

The trial court told Holcomb it disagreed with his claim Steele's dismissal of her petition required the court to make Holcomb the prevailing party, explaining the court had discretion to make this determination. The court concluded Holcomb was not the prevailing party based on the circumstances surrounding the case, explaining "sometimes there's other reasons for dismissing the case." (See *Gilbert v. National Enquirer, Inc*. (1997) 55 Cal.App.4th 1273, 1275-1276 [affirming trial court's finding it was premature to make a practical determination who prevailed because of an early dismissal.)

Holcomb points to some dubious statements the court made about his pro per status and the necessity to find the petition was filed in bad faith before awarding attorney fees. (See *Mix v. Tumanjan Development Corp*. (2002) 102 Cal.App.4th 1318, 1321 [pro per litigant may recover attorney fees if assisted by counsel who did not make formal appearance]; *Krug, supra*, 172 Cal.App.4th at p. 798 [section 527.6 allows a defendant to recover attorney fees even if the plaintiff brought the action in good faith].) But the court's comments were hypothetical and made when "assuming for argument purposes . . . you are the prevailing party." But the fact remains the court at the outset of the hearing declined to make Holcomb the prevailing party because there are "other reasons" for dismissing the case.

Holcomb failed to include Steele's opposition brief opposing Holcomb's motion to reconsider the denial of his attorney fee request, which may contain the "other reasons" prompting the court not to designate Holcomb as the prevailing party. Because we must presume the court correctly issued its order, the burden is on the appellant to provide an adequate record showing the court erred. The "'[f]ailure to provide an adequate record on an issue requires that the issue be resolved against [the appellant].'" (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609.) We therefore must presume the court properly exercised its discretion. (See *Heather Farms, supra*, 21 Cal.App.4th at pp. 1574-1575 [inadequate record prevented appellate court from measuring truth of allegations and therefore affirmed trial court's exercise of discretion finding homeowner was not prevailing party].)

III

DISPOSITION

The trial court's order denying Holcomb's request for attorney fees is affirmed. Steele is entitled to her costs on appeal.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.